

DRAFT REPORT FOR THE  
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PUBLIC AVAILABILITY OF INOPERATIVE AGENCY  
GUIDANCE DOCUMENTS**

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*This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).*

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Note: Professor Coglianese and I both served as project consultants and worked together to shape the research. The report itself is authored solely by me.

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## I. EXECUTIVE SUMMARY<sup>1</sup>

Building off the Administrative Conference of the U.S.’s (hereafter the Administrative Conference’s) 2019 project and recommendation on *Public Availability of Guidance Documents*, which focuses on the public availability of guidance documents in general, this report explores the public availability of *inoperative* guidance documents.

My research does not lend support to the conclusion that *all* inoperative guidance documents should be posted on agency websites. Rather, the report identifies a subset of inoperative guidance documents, which this report terms “priority inoperative guidance documents,”<sup>2</sup> and explains why it can be valuable for the public to have access to these documents on agency websites. It then examines agency practices for posting, organizing, and labeling such inoperative documents both on their websites and outside of their websites, including in the *Federal Register*.

Overall, the report’s findings are encouraging for public transparency and accessibility of inoperative guidance documents. First, with some notable exceptions, agencies are afforded a great degree of discretion in posting, labeling, and organizing inoperative guidance documents on their websites and in other venues. And, in general, agencies have used this discretion productively. Agencies have done a good job posting and organizing inoperative guidance documents on their websites: nearly 80% of priority inoperative guidance documents I identified were posted on agencies’ websites and 95% of these posted documents were organized on these websites using methods such as indexing, tagging, and sortable tables. Using concrete examples from several agencies, the report identifies some promising practices for organizing inoperative guidance documents on agency websites.

Moreover, agencies have used methods outside of their websites to inform the public of the inoperativeness of guidance documents. About 80% of the priority inoperative guidance documents I identified were noticed as inoperative in the *Federal Register*. The research conducted for this report also identified innovative practices agencies have adopted for notifying the public of the inoperativeness of guidance documents outside of agency websites, such as subscription services, webinars, and hosting virtual conferences with interested parties.

Yet there is some room for improvement, specifically in the realm of labeling. Only about 60% of inoperative guidance documents on agency websites were labeled as inoperative, and agencies

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<sup>1</sup> First and foremost, I thank Professor Cary Coglianese. Professor Coglianese’s 2019 report on public availability of guidance documents, the predecessor to this project, not only led to Administrative Conference Recommendation 2019-3 and profoundly shaped national policy on the topic of guidance availability, but also inspired the Administrative Conference’s project on *Public Availability of Inoperative Guidance Documents*, with which this report is affiliated. As anyone who knows Professor Cary Coglianese can attest, his towering intellect and knack for resolving seemingly intractable public policy challenges is matched only by his patience and kindness towards those who are fortunate enough to be taken under his wing. I consider myself to be one of those lucky few. Additionally, I thank the members of the staff of the Administrative Conference’s Office of the Chairman, especially Acting Chair Matt Wiener, Research Director Reeve Bull, and Deputy Research Director Mark Thomson, who provided valuable input on drafts. I also thank the Administrative Conference members and others who contributed their limited time to this endeavor. This work would not have been possible without them.

<sup>2</sup> The term “priority inoperative guidance document” is explained below in Section II.

posted a notice of inoperativeness – usually in the form of a press release – for only about 60%. Posting an inoperative guidance document on an agency website can only be helpful to the public if it is labeled as inoperative. The fact that about 40% of posted inoperative guidance documents were not labeled as such indicates that there may be confusion as to whether posted guidance documents are inoperative. The report identifies and highlights some concrete practices that contribute to confusion over whether a posted inoperative guidance document is inoperative, as well as some promising labeling practices that can make clear the status of an inoperative guidance document.

Building off of these promising practices and the areas identified for improvement, the report proposes recommendations for agencies to improve public access to priority inoperative guidance documents. Improving such access will help make it easier and fairer for the public to understand agency policies and how agencies interpret the legal obligations imposed on the regulated community.

## II. BACKGROUND

### *Reasons for the Study*

Several years ago, the Administrative Conference began a well-received initiative to encourage the public disclosure of important legal materials through publication on agency websites. Many recommendations followed.<sup>3</sup> Among these was Recommendation 2019-3, *Public Availability of Agency Guidance Documents*. Shortly after Recommendation 2019-3 was adopted, the now-revoked<sup>4</sup> Executive Order 13,891, *Promoting the Rule of Law Through Improved Agency Guidance Documents* (Oct. 19, 2019) was issued, a key provision of which addressed website publication of agency guidance documents.<sup>5</sup>

At the Plenary session at which Recommendation 2019-3 was debated, several Administrative Conference members, drawing on a recommendation from a report prepared by Professor Coglianesi,<sup>6</sup> asked whether and how agencies should provide public access to inoperative guidance documents. (The term “inoperative guidance document” will be explained below under “Explanations of Key Terms.”). As one member explained at that time, whereas members of the public can find copies of inoperative laws in the *Statutes at Large* and the *Federal Register*, there is no official, comprehensive compendium or repository of inoperative guidance documents.

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<sup>3</sup> See, e.g., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021); Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Recommendation 2019-8, *Public Identification of Agency Officials*, 84 Fed. Reg. 71354 (Dec. 27, 2019); Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019); Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017); Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012).

<sup>4</sup> See Exec. Order. 13992, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049 (Jan. 20, 2021).

<sup>5</sup> See also Exec. Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55239 (Oct. 15, 2019).

<sup>6</sup> See Cary Coglianesi, *Public Availability of Agency Guidance Documents* 59 (May 15, 2019) (report to the Admin. Conf. of the U.S.).

Consequently, when an agency removes a guidance document from its website—whether because it has been replaced, rescinded, rendered obsolete, or otherwise—the guidance document may, in effect, be lost forever to the public or become difficult to discover or obtain except by an individualized Freedom Of Information Act (FOIA) request. That is a problem for persons who may wish to rely on or cite such documents in court and agency proceedings, for instance in defenses to enforcement actions or to anticipate defenses to enforcement actions.

Inoperative guidance documents may also assist lawyers, judges, and others in understanding or interpreting the law by comparing alternative (albeit abandoned) views that such documents express. As several scholars have noted, guidance development is often an iterative process.<sup>7</sup> An agency issues a guidance document; the public responds to that guidance document by giving input to the agency; the agency changes the guidance document incrementally in response to public input, and so on. That kind of frequent evolution will be much easier for stakeholders to follow and understand if they can see the baseline from which the most recent incremental departures were made. In this context, preservation and public availability of the prior guidance document is key. It clarifies what the agency is doing in each step of the evolution of that guidance document, assuring stakeholders that flexibility is being balanced with consistency and that special favors are not being given. It also helps educate stakeholders in how the agency thinks about changes to guidance documents and the processing of requests for such change, which would help stakeholders in making constructive proposals for individual departures or general modifications from agency guidance documents in the future.<sup>8</sup>

Yet another reason the subject is important is because of a concern that Professor Coglianese raised in his 2019 study: the currency of guidance documents on agency websites. Professor Coglianese noted that it is imperative for the public to know that if an agency has posted an inoperative guidance document that such a document is, in fact, inoperative.<sup>9</sup> There are real dangers to the public if an agency posts an inoperative guidance document that is not labeled as such. Members of the public can rely on such a document to their detriment.

When it adopted Recommendation 2019-3, the Administrative Conference decided that the subject of public access to inoperative guidance documents was outside the project's general scope. It appeared to be the case, though, that the subject could usefully be taken up in a successor project. This report is written in support of that successor project.

### ***Scope of my Research***

The goal of my research was to develop solid evidence to support potential recommendations to agencies for maintaining public access to certain kinds of inoperative guidance documents. In doing so, the report: (1) identifies factors that agency officials and members of the public consider to be useful in helping agencies decide which kinds of inoperative guidance documents they should retain on their websites; (2) uncovers ways that agencies organize inoperative

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<sup>7</sup> See Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490 (1992).

<sup>8</sup> Full credit for this rationale, and for the way it is phrased here, goes to Nick Parrillo, who, among others, shaped key aspects of this report.

<sup>9</sup> See Coglianese, *supra* note 6, at 38.

guidance documents on their websites to facilitate public access; and (3) uncovers particular labels agencies use to help the public understand the meaning and effect of publicly available inoperative guidance documents.

There are many questions that, although important, fell outside the scope of my research. For example, it was outside the scope of my research to derive a comprehensive taxonomy of “inoperative guidance documents” and it was outside the scope of my research to advise agencies on how to decide whether a given guidance document is rescinded, superseded, or has fallen into disuse.

There are many other important questions to examine regarding agency’s management of their guidance documents – and their material more broadly – that were outside the scope of my research but are being addressed concurrently by the Administrative Conference.

For example, the Administrative Conference has an ongoing project called *Classification of Agency Guidance*, which will develop a classification system to catalog the wide array of guidance agencies issue, which can range from policy manuals to phone calls. It will also identify considerations and circumstances that lead agencies to use one type of guidance instead of another. That project will produce a guide that sets forth a classification scheme and examines how agencies use the many different forms of guidance available to them.

The Administrative Conference also has an ongoing project called *Improving Notice of Regulatory Changes*, which studies the extent to which agencies’ current practices for providing public notice of relevant changes in law or policy (“regulatory changes”) might not provide some interested persons with actual notice of those changes. The project surveys agencies’ current practices for providing interested persons with notice of regulatory changes; explores and compares the effectiveness of different approaches to providing interested persons with notice of regulatory changes; and identifies factors for agencies to consider in assessing the effectiveness of their current practices for providing interested persons with notice of regulatory changes. Although there is some overlap between this report and the project on *Improving Notice of Regulatory Changes*, this report is narrower in scope in that it focuses only on inoperative guidance documents rather than the broader set of materials at issue in that project.

Finally, the Administrative Conference is considering initiating a new project that would bear on federal agency publication requirements. Part of the project would synthesize existing Administrative Conference recommendations about publishing certain types of agency materials. Another part of the project would make recommendations about harmonizing and modernizing existing statutes bearing on disclosure, including FOIA, the Federal Records Act, and the E-Government Act, focusing on providing a more comprehensive overview of what legal materials agencies should disclose and how they should do so.

## *Explanations of Key Terms*

### *Guidance Documents*

Although there are variations in the definitions of guidance documents, for the purposes of this report, the term “guidance document” means an interpretive rule, a policy statement, and any other document that an agency labels or refers to as a “guidance document.”<sup>10</sup>

### *Inoperative Guidance Documents*

Inoperative guidance documents are those guidance documents, or portions of guidance documents, that no longer reflect the agency’s thinking. For the purposes of this report, there are three broad categories of *inoperative* guidance documents: rescinded guidance documents, superseded guidance documents, and disused guidance documents. A guidance document can be operative in part and inoperative in part.

### *Rescinded Guidance Documents*

The first type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that an agency has rescinded, withdrawn, repealed, or taken similar action. (For the sake of simplicity, the report will just use the term “rescinded.”). By “rescinded,” the report means that an agency has affirmatively decided, in some way, that a particular guidance document or portion of a guidance document is no longer operative. An agency can rescind a guidance document or portion of a guidance document in different ways, but this report is not focused on examining these different ways. The key point for purposes of this report is that, for inoperative guidance documents in this first category, an agency has made an *affirmative decision* to rescind a *specific guidance document* or a *specific portion* of a guidance document.

### *Superseded Guidance Documents*

The second type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that an agency has *not* rescinded (as described above), but that have been superseded by a later-in-time regulatory, statutory, or judicial action. For example, if the agency has issued an interpretive rule that interprets a rule (or statute), but that rule (or statute) is then repealed, the interpretive rule becomes mooted, and is therefore superseded. Another example would be if an agency issues a policy statement, but then issues a legislative rule that flatly contradicts the policy statement (the policy statement says “x” and the later-in-time legislative rule says “-x”). That earlier policy statement would therefore be superseded. This is not an exhaustive list of ways a guidance document, or a portion of a guidance document, can become superseded. Of course, if an agency *knows* that a guidance document, or a portion of a guidance document, has been superseded, it likely would rescind it. But agencies sometimes possess tens of thousands of guidance documents. If an agency has not kept track of such supersessions in real time, these documents can quickly accumulate, at which point it could become difficult for an agency to go back and decide which documents have been superseded in whole or in part, and which ones have not. As noted above, it was outside the scope of my

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<sup>10</sup> See Coglianesi, *supra* note 6, at 3–9; see also Recommendation 2019-3, *supra* note 3.

research to advise agencies on how to identify whether a particular document has become superseded.

### *Disused Guidance Documents*

The third type of inoperative guidance documents are those guidance documents, or portions of guidance documents, that do not fit into the two categories above but have fallen into disuse. For example, an agency may have simply distanced itself from a guidance document or portion of a guidance document. Perhaps at one point in time, the agency frequently cited the guidance document in briefs and prominently highlighted it on its website but then later, either suddenly or gradually, the agency stopped doing so. Even if the agency did not rescind the guidance document, or even if the document has not been flatly contradicted or mooted by a later-in-time statutory or regulatory action, it is still possible for the guidance document to become inoperative if the agency has just drifted away from it or stopped using it. This could sometimes occur simply because the guidance document is antiquated, such as by referring to outmoded technologies.

One can sensibly ask: How long of a period does it take for an agency ceasing to cite a guidance document before it can be said to fall into disuse? This report does not attempt to answer that question; delineating exactly when a guidance document has fallen into disuse was outside the scope of my research. This category is noted simply to give the readers a general understanding of a major type of inoperative guidance document.

### *Priority Inoperative Guidance Documents*

For the purposes of this report, priority inoperative guidance documents are those inoperative guidance documents that: (1) appear to be of interest to the public, as indicated by a large number of unique inquiries, page views or downloads of the inoperative guidance document; (2) generated reliance interests while they were operative, as indicated by frequent citations of the operative version of the document in regulations, briefs, or news sources, or a high volume of public input on the operative version of the document; or (3) expressed the agency's position on controversial issues or issues of national importance while they were operative, as indicated by submission to the Office of Information and Regulatory Affairs (OIRA) of the initial (now inoperative) guidance document or publication in the agency's *Unified Agenda* of the same.

### *Administrative Conference Recommendation 2019-3*

Recommendation 2019-3 formed the backbone of my research and so it is useful to summarize here what that recommendation covered and, just as importantly, what it did not cover with respect to inoperative guidance documents. Recommendation 2019-3 is divided into three main sections: the first urges agencies to establish written policies for the internal management of guidance documents (see ¶¶ 1–6); the second urges agencies to organize guidance documents on websites (see ¶¶ 7–10); and the third urges agencies to notify the public of new or revised

guidance documents (see ¶¶ 11 and 12).<sup>11</sup> Whether these parts spoke at all to inoperative guidance—and, if so, how—is summarized here.

#### *Posting/Removing Inoperative Guidance Documents*

Recommendation 2019-3 does not specifically address whether agencies should post inoperative guidance documents on their websites or whether they should remove them.

#### *Organizing Inoperative Guidance Documents on Agency Websites*

Recommendation 2019-3 does not address how agencies should organize inoperative guidance documents on their websites. It does, however, have a suite of suggestions for agencies on how to organize operative guidance documents on their websites (see ¶¶ 7–10). The principles of the Recommendation, though, apply to inoperative guidance documents if agencies choose to post them on their websites.

For example, agencies are encouraged to establish dedicated guidance webpages (see ¶ 7). Agencies are given different ways to organize their guidance documents, including using lists of guidance documents that are tagged, indexed, or put into sortable tables; including links to guidance documents that are organized by type of guidance document, topic, component, or other criteria; and creating a dedicated search engine for guidance documents (see ¶ 7(c)).

#### *Notifying the Public of the Inoperativeness of Guidance Documents*

Recommendation 2019-3 advises agencies that, for inoperative guidance documents posted on their websites, they should include the date such documents were rescinded, as well as a prominent notification that such documents are rescinded (see ¶ 8(e)). It also advises agencies to link from the inoperative guidance document to the updated version of the document (see ¶ 8(e)).

### **III. EXISTING LEGAL REQUIREMENTS AND GENERAL GUIDANCE WITH RESPECT TO INOPERATIVE GUIDANCE DOCUMENTS**

This section highlights the key sources of law and general guidance that bear on inoperative guidance documents. No claims are made about whether lack of compliance with any of these provisions can occasion legal or other consequences for agencies. When this section uses

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<sup>11</sup> Recommendation 2019-3, *supra* note 3.

mandatory language such as “must” or “requires,” it does so merely to reflect the language that is contained within these sources of law or guidance.

With some notable exceptions, agencies are given wide latitude to decide whether to post, remove, organize, and label inoperative guidance documents. The table below and the analysis that follows illustrate the contours of this latitude.

Please see Appendix A for excerpts from key statutes.

*Table 1: Summary of Relevant Governmentwide Provisions*

Type of Inoperative	Requirement to post on website?	Requirement to remove from website?	If posted on website, requirement to organize in any particular way?	If posted on website, requirement to label the document in any particular way?	Requirement to publish notice of inoperativeness on website?	Requirement to publish notice of inoperativeness in Fed. Reg.?
Rescinded	Only if agency deems “of general interest or use to the public.” <i>See</i> 44 U.S.C. § 3102 (2).	N	Agencies must establish a search function to help people locate document. <i>See</i> OMB M-06-02 § 1 (2005).	N	Only: (1) if agency is not an “independent regulatory agency” as defined in 44 U.S.C. § 3502(5); and (2) if the document is a “significant guidance document”; and (3) for one year after rescission. <i>See</i> OMB BULL. No. 07-02, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).	Only if it is a “statement of general policy or interpretation of general applicability formulated and adopted by the agency.” <i>See</i> 5 U.S.C. § 552(a)(1).
Superseded	Only if agency deems “of general interest or use to the public.” <i>See</i> 44 U.S.C. § 3102 (2).	N	Agencies must establish a search function to help people locate document. <i>See</i> OMB M-06-02 § 1 (2005).	N, but agencies aside from “independent regulatory agencies” as defined in 44 U.S.C. § 3502(5) are encouraged to stamp or otherwise prominently	N	N

				identify as “superseded” those superseded guidance documents that remain available for historical purposes. See OMB BULL. NO. 07-02, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).		
Disuse	Only if agency deems “of general interest or use to the public.” See 44 U.S.C. § 3102 (2).	N	Agencies must establish a search function to help people locate document. See OMB M-06-02 § 1 (2005).	N	N	N

## **FOIA**

FOIA applies to nearly all agencies. Section 552(a)(1) of Title 5 of the U.S. Code establishes certain requirements for, among other materials, “general statements of policy” and “general interpretations formulated and adopted by the agency” (hereafter “(a)(1) guidance documents”). Section 552(a)(2) establishes certain requirements for, among other materials, “statements of policy and interpretations adopted by the agency but not published in the *Federal Register*” (hereafter “(a)(2) guidance documents”).<sup>12</sup> As will be discussed below, (a)(1) materials are required to be published in the *Federal Register*, whereas (a)(2) materials are required to be published on agency websites.<sup>13</sup>

### *Posting or Removing Inoperative Guidance Documents*

FOIA generally requires agencies to post *operative* (a)(1) guidance documents in the *Federal Register* and *operative* (a)(2) guidance documents on their websites. FOIA does not require agencies to post or to remove *inoperative* guidance documents.

### *Organizing Inoperative Guidance Documents on Agency Websites*

There are no provisions in FOIA with respect to organizing materials on agency websites.

<sup>12</sup> Freedom of Information Act, 5 U.S.C. § 552 (2018)

<sup>13</sup> See, e.g., Nat’l Org. of Veterans’ Advocs. v. Sec’y of Veterans Affairs, 981 F.3d 1360, 1375 (Fed. Cir. 2020); Jud. Watch, Inc. v. U.S. Dep’t of Def., 847 F.3d 735, 739–40 (D.C. Cir. 2017).

## *Notifying the Public of the Inoperativeness of Guidance Documents*

FOIA requires agencies to publish “repeals” of (a)(1) guidance documents in the *Federal Register*.<sup>14</sup>

FOIA does not require agencies to publish a notice when they have merely stopped relying on a guidance document (disuse). FOIA also does not require agencies to publish a notice when a guidance document has been superseded, assuming the agency has not repealed it. As noted above, agencies may not realize that a guidance document has been superseded or that it has fallen into disuse; FOIA does not require them to make such a determination.

FOIA does not require agencies to publish repeals of (a)(2) guidance documents. FOIA also does not require agencies to affix any sort of label of inoperativeness within *any* inoperative guidance documents, whether (a)(1) or (a)(2).

## ***The Federal Records Act***

### *Posting or Removing Inoperative Guidance Documents*

The Act imposes the following general responsibility on each agency: “The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for ... procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.”<sup>15</sup>

There have been no published judicial opinions to date that interpret the phrase “general interest or use to the public” nor does there appear to be any published governmentwide guidance that interprets this phrase. Agencies therefore appear to have wide latitude to determine which of their documents – including their inoperative guidance documents – are of “general interest or use to the public” and therefore to be posted online.

As the discussion above under “Reason for the Study” (Part II) makes clear, some inoperative guidance documents are of interest or use to at least some people. For example, there are some inoperative guidance documents that help regulated entities establish defenses in enforcement actions and help interested members of the public anticipate those defenses. Some inoperative guidance documents help the public make constructive proposals for individual departures or general modifications from guidance documents and clarify what the agency is doing in each step of the evolution of guidance documents. Some inoperative guidance documents may therefore qualify as being of “general interest or use to the public.” But ultimately, agencies get to decide.

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<sup>14</sup> 5 U.S.C. § 552(a)(1)(E).

<sup>15</sup> 44 U.S.C. § 3102 (2).

### *Organizing Inoperative Guidance Documents on Agency Websites*

There are no requirements under the Federal Records Act with respect to organizing materials on agency websites.

### *Notifying the Public of the Inoperativeness of Guidance Documents*

There are no requirements under the Federal Records Act with respect to notifying the public of the inoperativeness of guidance documents.

### ***The E-Government Act***

The E-Government Act of 2002 was enacted to promote the use of the Internet and other technologies to improve citizen access to government information and services, improve government decision making, and enhance accountability and transparency. The Act requires agencies, to the extent practicable, to “ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register.” Since FOIA requires agencies to publish repeals of (a)(1) guidance documents in the *Federal Register*, the E-Government Act applies to those repeal notices.

### *Posting or Removing Inoperative Guidance Documents*

The Act imposes no obligations for posting or removing inoperative guidance documents.

### *Organizing Inoperative Guidance Documents on Agency Websites*

The Act authorizes the Office of Management and Budget (OMB) to issue binding policies upon agencies to implement the Act. One such policy, M-06-02, requires agencies to organize materials on their websites and to establish a search function to allow members of the public to search for these materials. It does *not* specify particular organizational choices. It does say, however, that agencies “should” consult with users on selecting a design choice.<sup>16</sup> If an agency chooses to post *any* document on its website, whether an inoperative guidance document or any other kind of document, it would be subject to these requirements.

### *Notifying the Public of the Inoperativeness of Guidance Documents*

The E-Government Act requires each document that agencies publish in the *Federal Register* to be made available online. The Act does not specify where online such documents must appear, but, in practice, such documents appear on [Federalregister.gov](http://Federalregister.gov). As discussed above, agencies must publish a rescission notice in the *Federal Register* when they rescind (a)(1) guidance documents. Therefore, notices of rescission of (a)(1) guidance documents must appear online. As soon as such notices make it onto [Federalregister.gov](http://Federalregister.gov), this obligation is satisfied.

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<sup>16</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum M-06-02, Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model § 1 (2005), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2006/m06-02.pdf>.

## ***Agency-Specific Legal Requirements***

In addition to the above requirements that apply to most or all federal agencies, individual agencies can sometimes be subject to their own specific requirements for making legal materials available to the public.

I used the following sample of agencies to search for agency-specific legal provisions related to whether an agency must post or remove inoperative guidance documents and to notify the public if a guidance document is inoperative: U.S. Department of Education (ED); U.S. Department of Transportation-main (DOT-main); the Federal Trade Commission (FTC); the Consumer Financial Protection Bureau (CFPB); the U.S. Department of Labor (DOL); the Environmental Protection Agency (EPA); the U.S. Department of Health and Human Services (HHS); the U.S. Department of Housing and Urban Development (HUD); the Internal Revenue Service (IRS); the National Highway and Traffic Safety Administration (NHTSA); the Securities and Exchange Commission (SEC); the U.S. Department of Agriculture (USDA); the Food and Drug Administration (FDA); and the Department of Defense (DOD). This is the same sample that Professor Coglianesi used in his report to search for agency-specific legal provisions for *operative* guidance documents.<sup>17</sup> Although the sample is not representative, it does cover a wide swath of agencies, including independent regulatory agencies, as well as parent agencies and sub-agencies.

I searched the U.S. Code for requirements to post inoperative guidance documents and to notify the public of them, and I found nothing for any of these agencies.<sup>18</sup> And then I looked for possible agency-imposed requirements in the *Code of Federal Regulations* (CFR). I found no requirements to post inoperative guidance documents, but I did find that five agencies have adopted procedures for notifying relevant parties of guidance rescissions.<sup>19</sup>

### ***OMB's 2007 Good Guidance Bulletin***

The OMB Bulletin has been described as “generally applicable guidance on guidance.”<sup>20</sup> It applies to all agencies aside from those that are considered independent regulatory agencies as the term is used in 44 U.S.C. § 3502(5). Some parts of the Bulletin are couched in mandatory terms, and some parts in precatory terms.<sup>21</sup>

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<sup>17</sup> See Coglianesi, *supra* note 6, at 27.

<sup>18</sup> I used the following search: (guidance interp! policy!)/150 (withdraw! cancel! supersed! archiv! rescind! rescission repeal! inoperative historic! revoke! modify! amend!).

<sup>19</sup> As of September 22, 2021, those five agencies are: CFPB, 12 C.F.R. § 1070.12 (rescission notice in Fed. Reg.); FDA, 21 C.F.R. § 10.85 (rescission notice in Fed. Reg. or via other means, and placed on public display in Division of Docket Management); ED, 34 C.F.R. § 9.16 (rescission notice in Fed. Reg.); DOT-main, 49 C.F.R. § 7.11 (rescission notice in Fed. Reg.); IRS, 26 C.F.R. § 601.702 (rescission notice in Fed. Reg.).

<sup>20</sup> See Coglianesi, *supra* note 6, at 29.

<sup>21</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

### *Posting or Removing Inoperative Guidance Documents*

The Bulletin generally calls for covered agencies to establish dedicated guidance web pages on which they post *operative* significant guidance documents. It does not call for agencies to post or remove *inoperative* guidance documents.

### *Organizing Inoperative Guidance Documents on Agency Websites*

There are no provisions in the Bulletin with respect to organizing inoperative guidance documents.

### *Notifying the Public of the Inoperativeness of Guidance Documents*

The Bulletin calls for agencies to publish a list of guidance documents on their guidance webpages and to identify within this list all significant guidance documents that have been “withdrawn” in the past year. Note that the Bulletin does not call for agencies to keep the inoperative document up on their websites for one year, just that they need to “identify” the withdrawn document on their website for one year. For example, an agency could fulfill the provision to “identify” such documents by posting a simple statement on its website, such as: “The following significant guidance documents were withdrawn in the past year: Document 662; Document 674.”

The Bulletin also calls for agencies to note, within the text of a newly published significant guidance document, whether it is a revision to a previously issued guidance document and, if so, identify the document that it replaces. The Bulletin *encourages* agencies, when issuing a new significant guidance document, to clarify for the public whether the new document entirely supersedes the old one and, if not, to specify what provisions in the old guidance document remain in effect. The Bulletin also *encourages* agencies to stamp or otherwise prominently identify as “superseded” those superseded guidance documents that remain available for historical purposes.

## **IV. CURRENT STATE OF AVAILABILITY OF INOPERATIVE GUIDANCE DOCUMENTS**

Given that agencies largely have discretion about when and how to make inoperative guidance documents available online, it may be wondered whether agencies are in fact currently making inoperative guidance documents available on their websites—and, if so, how they are making them available. In an effort to find out, I conducted interviews with officials across a range of agencies, met with varied members of the public, and collected a sample of guidance documents that had recently been rescinded by agencies and looked to see whether they could be found on the agencies’ website. Specifically, the aim of my research was to address the following seven questions:

*What kinds of inoperative guidance documents do agency officials and members of the public think are important for the public to access via an agency website?*

Summary of Findings:

1. Presumably a necessary condition for concluding that an inoperative guidance document should be made available online would be the agency's prior determination that the *operative* version of the guidance document merited posting online.
2. In addition, agency officials and members of the public seem to think that additional considerations may be helpful in determining if a further subset of such inoperative guidance documents should be made a priority for retaining online: (1) whether the inoperative guidance document generates a large number of unique inquiries, page views, or downloads; (2) whether the inoperative guidance document is one for which its operative version was frequently cited in regulations, briefs, or news sources, or received a high volume of public input while operative; or (3) whether the inoperative guidance document is one for which the operative version had been submitted to OIRA or was published in the agency's *Unified Agenda*.

*What problems have people faced trying to access these kinds of inoperative guidance documents and trying to understand whether a posted guidance document is inoperative?*

Summary of Findings:

1. In general, agencies appear to have done well in posting and organizing priority inoperative guidance documents on their websites, with nearly 80% of priority inoperative guidance documents I identified posted on agency websites and 95% of such documents organized using methods such as tagging, indexing, and sortable tables.
2. In general, agencies have done less well in labeling inoperative guidance documents as inoperative on their websites, with only about 60% of inoperative guidance documents labeled as inoperative and only about 60% having a notice of rescission on the agency website.
3. Certain agency practices, such as the use of ambiguous language to describe inoperative guidance documents may contribute to confusion over whether a posted document is inoperative.

*What resource constraints do agencies face in posting and organizing inoperative guidance documents on their websites?*

Summary of Findings:

1. I identified minimal resource constraints agencies face in posting inoperative guidance documents on their websites.

2. Organizing inoperative guidance documents entails the use of staff time but is generally accomplished effectively.

*What resource constraints do agencies face in labeling publicly posted inoperative guidance documents as inoperative or otherwise explaining their inoperativeness to the public?*

Summary of Findings:

1. Those agencies that have already established an internal system for tracking guidance documents from creation to rescission, in general, face minimal resource constraints in effectively labeling publicly posted inoperative guidance documents as inoperative or otherwise explaining their inoperativeness to the public.
2. Agencies that have not established such an internal tracking system could face immense challenges, including large amounts of staff time, in doing so.

*What are some examples of ways to organize inoperative guidance documents on agency websites?*

Summary of Findings:

1. Agency practices vary but there are several promising approaches identified, including establishing a dedicated table of inoperative guidance documents and creating a search engine that finds inoperative guidance documents

*What are some examples of ways to label inoperative guidance documents on agency websites?*

Summary of Findings:

1. Agency practices vary but there are several promising approaches identified, including affixing a watermark that reads “rescinded” across each page of an inoperative guidance document or affixing a label at the top of the document indicating the date it was rescinded.

*How have agencies labeled and explained inoperative guidance documents to the public aside from using agency websites?*

Summary of Findings:

1. Agencies have developed a variety of innovative approaches, and generally do a good job informing the public of the inoperativeness of guidance documents. For example, 80% of the priority inoperative

guidance documents I identified were noticed as rescinded in the *Federal Register*.

2. Innovative approaches include developing a subscription service that allows members of the public to subscribe to developments of interest, including being informed of when a guidance document becomes inoperative.

To answer the above seven questions, I spoke with agency officials, academics, representatives of public interest organizations, and representatives of regulated entities. Altogether, I spoke with eleven agency officials across six agencies, in addition to eighteen people who are not agency officials. I also reviewed relevant literature and analyzed agency websites.

I reached out to officials from all agencies whose websites I reviewed, and I was able to conduct interviews with officials from the following: DOT-main; DOL; NHTSA; FTC; DOD; and ED.

### ***What Kinds of Inoperative Guidance Documents are Important for the Public to Access via an Agency Website?***

There appeared to be general agreement from interviewees that it is *not* important for the public to be able to view on an agency website every inoperative guidance document an agency has ever issued. At a minimum, it would seem that a necessary condition for deciding whether to publish an inoperative guidance document online would be whether its operative version had been published online. There also appeared to be general agreement that additional considerations may be relevant. In other words, there are only certain kinds of inoperative guidance documents for which it is important for the public to be able to view on an agency website, which this report has referred to as “priority inoperative guidance documents.” (See below for the kinds of documents that may constitute “priority inoperative guidance documents.”)

If priority inoperative guidance documents are not available on agency websites (and are only available via, say, a FOIA request), then less resourced parties are at a disadvantage relative to parties able to afford to hire lawyers who know how to file FOIA requests. That is why, according to the people with whom I spoke, access to priority inoperative guidance documents on agency websites is critical: it assures equal access.

There appeared to be general agreement that the following factors may indicate whether a given inoperative guidance document is a priority inoperative guidance document:

- i. A large number of unique inquiries, page views or downloads of the inoperative guidance document (may indicate public interest in the inoperative guidance document) (note that page views or downloads would only apply while the guidance was operative or to inoperative guidance documents that agencies have already made available);
- ii. Frequent citations of the operative version of the document in regulations, briefs, or news sources, or a high volume of public input on the operative version of the document (may indicate reliance interests); or

- iii. Submission to OIRA of the initial (now inoperative) guidance document or publication in the agency's *Unified Agenda* of the same (may indicate national significance/controversy)<sup>22</sup>

There appeared to be general agreement that it can be helpful for the public to access priority inoperative guidance documents on agency websites *regardless of whether these documents were made inoperative by a rescission, supersession, or disuse*, as long as agencies make clear that they are inoperative.

By contrast, there appeared to be general agreement that it is not as important for the public to be able to access, on agency websites, inoperative guidance documents to which none of the factors above apply. Indeed, it would actually be problematic to list too many documents, as that would increase the risk of an information overload.

### ***What Problems Have People Faced Trying to Access Priority Inoperative Guidance Documents and Understand Whether Publicly Posted Inoperative Guidance Documents are Inoperative?***

To get a rough understanding of the degree to which agencies post priority inoperative guidance documents, I focused on ten agencies: ED; EPA; FDA; DOL; DOT-main; NHTSA; DOD; CFPB; the U.S. Patent and Trade Office (USPTO); and FTC. For each of these agencies, I used other sources to identify recently rescinded guidance documents—a total of 19 in all—and then I went to the agency websites to see whether the rescinded documents could be found and, if so, whether they were labeled as being inoperative. This allowed me to calculate a percentage of priority inoperative guidance documents found on agency websites.

There is, of course, no way to perfectly know the denominator—that is, the number of priority inoperative guidance documents in existence. For example, Agency A may have 200 priority inoperative guidance documents on its website, and Agency B has only 10. But if Agency A has 10,000 priority inoperative guidance documents in existence and Agency B has only 20 in existence, Agency B posts its priority inoperative guidance documents to a far greater degree than Agency A, even though it has far fewer priority inoperative guidance documents on its website. Therefore, I could not determine with certainty to what degree these agencies posted their inoperative guidance documents.

Nonetheless, to at least get a rough sense of the percentage of guidance documents made available, I identified as many priority inoperative guidance documents from each of these agencies as I could. In total, I discovered nineteen priority inoperative guidance documents from these agencies. Please see Appendix B for the complete list of these guidance documents.

I determined that a guidance document was “inoperative” if a reputable news source reported that the Biden Administration rescinded a guidance document, or if a *Federal Register* entry during the Biden Administration announced the rescission of a guidance document. I limited my analysis to the Biden Administration for the following reason: if a document was rescinded during the Biden Administration, I could be confident that the document remained rescinded. If a

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<sup>22</sup> Only especially significant guidance documents are submitted to OIRA or identified in the *Unified Agenda*.

document was rescinded during a previous administration, I could not be certain that the document still remains rescinded without further digging, which time did not allow.

I determined that a guidance document was a “priority” inoperative guidance document if, while operative, it was mentioned in at least one major national news source or was published in the *Federal Register*. Of the nineteen inoperative guidance documents I found, four were identified only in the media and were not available on agency websites and fifteen were available on agency websites.<sup>23</sup>

Obviously, this is an imperfect count of the denominator, for many reasons. To name a few: first, because there are undoubtedly guidance documents that previous administrations have withdrawn that are still withdrawn; for example, just because the Trump Administration withdrew a guidance document issued during the Obama Administration, that does not mean that the Biden Administration has resuscitated that guidance document. Second, because agencies may have withdrawn guidance documents during this administration without announcing it in the *Federal Register* or a news source picking it up. Third, news sources and *Federal Register* entries only pick up when agencies rescind guidance documents, not when guidance documents become inoperative *sans* rescission.

Nonetheless, Table 2 reports the results of what I found.

*Table 2: Summary of Findings for Nineteen Priority Inoperative Guidance Documents Across Ten Agencies*

<b>Row A: Percentage of inoperative guidance documents posted on agency websites</b>	79
<b>Row B: Percentage of guidance documents removed from agency websites once they became inoperative</b>	21
<b>Row C: Percentage of inoperative guidance documents organized in a particular way on website (e.g., indexed, tagged, or in sortable table)</b>	95
<b>Row D: Percentage of inoperative guidance documents labeled as inoperative on agency website</b>	58
<b>Row E: Percentage of inoperative guidance documents for which a notice of</b>	63

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<sup>23</sup> To search for news sources that mentioned a rescission of a guidance document, I Googled the terms “[agency] withdraws guidance” plus variants of “withdraws” including “rescinds,” “cancels,” “revokes,” and “amends”; and variants of “guidance” including “policy,” “policy statements,” “interpretation,” “interpretive rule,” and “interpretive ruling.” To search for indications in the *Federal Register* that an agency withdrew a guidance document, I selected the relevant agency under the *Federal Register*’s “Advanced Search,” and entered the term “guidance” along with the variants of “guidance” mentioned above and scrolled through all the entries from the Biden Administration.

<b>inoperativeness was published on agency website</b>	
<b>Row F: Percentage of inoperative guidance documents for which a notice of inoperativeness was published in Fed. Reg.</b>	79

The percentage in Row A of the table above is quite promising: about 80% of priority inoperative guidance documents have been posted on agency websites. It suggests that priority inoperative guidance documents may well be widely available on agency websites.

Row C’s statistic, which shows that about 95% of such documents have been organized in a logical fashion, such as through indexing, tagging, or in a sortable table, is even more promising, as it suggests that not only are the documents generally available on websites, but they can be readily found. Conversations and interviews lent anecdotal support for what these statistics suggest is a widespread availability of inoperative guidance documents on agency websites. Although one person with whom I spoke reported that he could not find inoperative guidance documents at least some of the time, the remainder of the respondents either reported having no difficulty finding them or at least did not report difficulties finding them.

The statistics in Rows D and E illustrate ample room for improvement with respect to the labeling of inoperative guidance documents. Only about 60% of the inoperative guidance documents I identified were labeled as inoperative, and about the same percentage had an affiliated notice of rescission on the agency website. Conversations and interviews lent anecdotal support for what these statistics suggest is an area for improvement. There appeared to be general agreement among the people with whom I spoke that, at least some of the time, they are unsure whether a publicly posted guidance document is inoperative. Professor Coglianese’s 2019 report also highlights examples of agencies not labeling publicly posted inoperative guidance documents as inoperative.<sup>24</sup>

Based on my interviews with agency officials and conversations with experts who interact with these agencies, it appears that, for the most part, there is a simple explanation for the lack of labeling on some of these documents: prioritization. Sometimes the lack of labeling is a policy decision, but sometimes it is just a resource issue. The agency intends to label the document as inoperative but has not gotten around to doing so.

I also observed practices that may contribute to confusing the public as to whether a posted guidance document is inoperative. Three examples are worth noting:

*Using Language That Gives Mixed Signals as to Whether a Document is Operative or Inoperative*

One agency has a link on one of its guidance pages that is roughly titled, “Archives of Key Guidance Documents Signed by the Agency Head or a Designee from Prior Administrations.” When the user clicks on that link, the user is taken to a page that has the label that refers to “Archived Information” along with links to various guidance documents. This labeling generates

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<sup>24</sup> See Coglianese, *supra* note 6, at 39–40.

confusion. Is the agency saying that because the guidance document was issued during a previous administration, it is now inoperative? Or is it just using this page to “deprioritize” some documents? In other words, are the documents still operative, but less important than ones issued during the current administration? This ambiguity could be resolved by indicating which of the specific documents are operative and which are not.

This same agency has a document that contains a linked list of guidance documents titled roughly, “Guidance Documents Promulgated Before 1999.” An explanatory paragraph under this title reads something to the following effect: “In addition to the guidance documents that appear on the [agency’s] website, the [agency] has identified a stock of older guidance documents in which some members of the public have expressed interest.” This explanation does not help the reader identify which of the listed documents are operative and which are inoperative. The term “older” does not resolve this ambiguity. A document can be “older” but still be “operative.” Again, this ambiguity could be resolved by the agency noting which of the specific documents are operative and which are not.

Of course, the agency’s approach here could solve the problem of letting the public know all the ways an agency has construed the law over the years. It therefore could be considered a viable practice to adopt, but only if the agency makes clear which documents (or portions of documents) are inoperative.

#### *Using a “Page Not Found” to indicate that a guidance document is inoperative*

Another agency’s website has a table that includes links to inoperative guidance documents. The inoperative documents are not labeled as inoperative. (I was only able to determine they were inoperative through performing the aforementioned news and *Federal Register* searches.) When one clicks on the link to an inoperative guidance document, rather than being taken to the document itself or to some description of the document, one is instead taken to a “Page Not Found.” This approach generates ambiguity. A person who does not know that this document was inoperative would not know if the “Page Not Found” means that there was some website error, or if the agency deliberately created a “Page Not Found” to signal that the document is inoperative. The agency could avoid this ambiguity by using some version of the labeling methods identified below.

#### *Posting rescission statements with no linkage from the inoperative guidance document to the rescission statement*

Three agencies in the sample adopted an approach whereby they posted guidance rescission notices on their websites, in the form of news releases, memoranda, and statements within guidance documents (e.g., “This guidance document hereby rescinds that guidance document”), but these rescission notices were not located anywhere near the inoperative document, nor was there any link or reference to the rescission notice from the inoperative guidance document. In other words, if a user happened upon the inoperative document, the user would have no way of knowing that the document was inoperative unless the user also happened upon the rescission notice: the agencies did not provide a link to the rescission notice from the inoperative guidance document nor did they provide any other indication, within proximity to the rescinded document,

that the rescission notice existed.

***What Resource Constraints do Agencies Face in Retaining and Organizing Priority Inoperative Guidance Documents on their Websites?***

*Storage Costs*

Agencies do not face significant resource constraints in retaining inoperative guidance documents on their websites. The only conceivable constraints are the costs of storage space on their servers for hosting documents. The agency officials I interviewed informed me that these costs are not an issue.

*Maintenance Costs*

Organizing inoperative guidance documents is more challenging but, considering the statistic I identified above in Row C, which indicates that about 95% of priority inoperative guidance documents are organized in some logical fashion, this appears to be an overall manageable task. Several agencies reported during interviews that they have become accustomed to indexing inoperative guidance documents, tagging them, creating search engines that uncover them, and putting them in tables.

What is more challenging, however, is *identifying* inoperative guidance documents, especially those that have been superseded and disused, rather than rescinded. This task is particularly onerous if performed as a retrospective exercise: that is, if an agency were to be asked to review its entire existing stock of guidance documents and identify those that have been superseded and disused, such a task would entail the expenditure of numerous staff hours and would take substantial time away from the agency's other priorities.

***What Resource Constraints do Agencies Face in Labeling Publicly Posted Priority Inoperative Guidance Documents as Inoperative or Otherwise Explaining their Inoperativeness to the Public?***

As noted in Rows D and E above, about 40% of the inoperative guidance documents posted on agency websites were not labeled as inoperative, and about 40% had no accompanying rescission notice on the agency website. Also as noted above, this is not because agencies lack awareness of the fact that these documents were inoperative. Rather, as revealed through interviews, agencies have numerous priorities, and the labeling of inoperative guidance document as "inoperative" does not always rise to the top.

As revealed by interviews, each of the agencies in my sample had internal management systems for tracking their guidance documents from creation to rescission. Each assigns their guidance documents unique identification numbers or some other label, thus allowing them to keep track of what is rescinded and what is not. Therefore, the task of identifying inoperative guidance documents and labeling them in real time is, in general, manageable, as long as the agency makes some time to do this.

However, as noted above, I cannot claim that my sample is representative of agencies throughout government. It is possible that there are agencies that do not have internal management systems for tracking their guidance documents. For such agencies, the task of identifying which documents are inoperative and which documents are operative would be tremendously challenging.

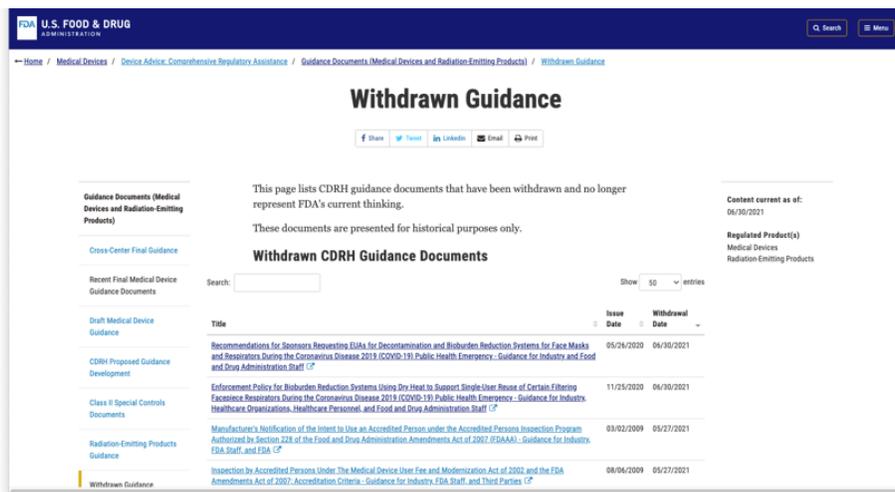
The task for such agencies is greater still with respect to those documents that are operative in part and inoperative in part. Such agencies would do well to heed the advice dispensed in Recommendation 2019-3 to develop “guidance identification numbers” to help them track their guidance documents internally. Such a system would allow them to keep track of what is operative and what is inoperative at any given moment.

### ***Examples of Ways to Organize Priority Inoperative Guidance Documents on Agency Websites***

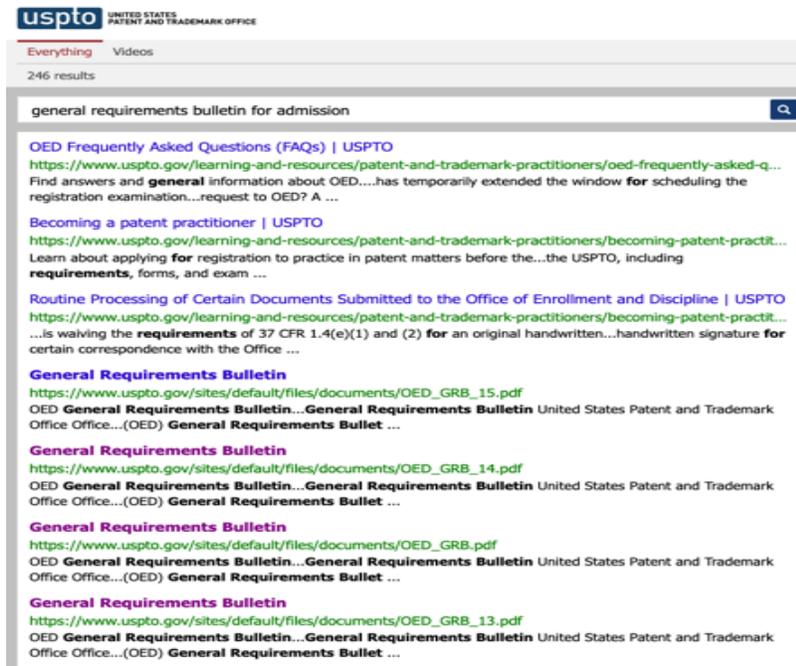
From my review of agency websites, I found a number of examples of useful and clear ways to organize priority inoperative guidance documents on agency websites. From them, it appears that agencies have at least three main options for how to organize their inoperative documents. These three organizational options, noted below, are not mutually exclusive. Indeed, agencies may wish to combine these various choices to optimally display their inoperative guidance documents:

Organizational Choice A (FDA): A table or tables dedicated exclusively to inoperative guidance documents, with links to such documents

The FDA has multiple such “withdrawn guidances” tables, each dedicated to a particular topic of withdrawn guidance (e.g., withdrawn food-related guidance, withdrawn veterinary-related guidance, withdrawn biologics-related guidance, etc.)



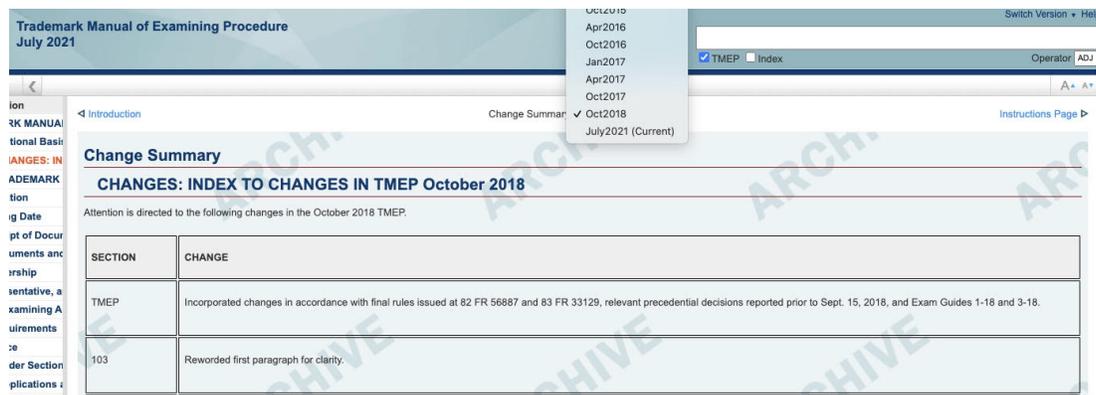
Organizational Choice B (USPTO): Search function that uncovers inoperative guidance documents



The USPTO does not provide access to these inoperative guidance documents in a table or list, but a user who knows they exist can find them by entering the relevant search term on USPTO’s search engine.

Organizational Choice C: A method (e.g., a pull-down menu) that allows the user to view an inoperative guidance document as it existed at different points in time, with clear notations that it is inoperative.

The USPTO offers readers access to the text of the inoperative guidance document at different points in time by allowing the reader to click on a month and date in a pull-down menu at the top of the document. For example, in the image below, if the user selects “October 2017,” the user will be taken to the version of the document as it appeared in October 2017, with a clear notation on the document that it is inoperative.



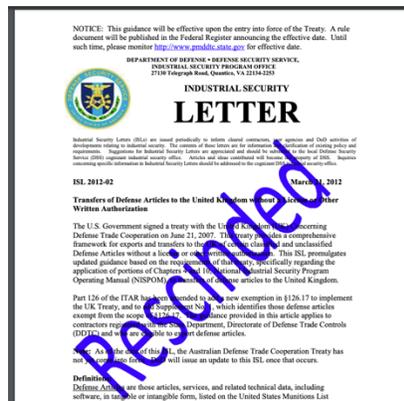
There is no single approach discussed above that is necessarily the “best practice.” Rather, each of these practices can be helpful for users to find inoperative guidance documents. Combining two or more of these approaches (e.g., a table of withdrawn guidance documents along with a search feature) may be better still.

### ***Examples of Ways to Label Priority Inoperative Guidance Documents on Agency Websites***

As with the organizational choices above, my review of agency websites revealed two main options for labeling guidance documents as inoperative. These options are not mutually exclusive. Indeed, agencies may wish to combine them to optimally label their inoperative guidance documents.

Labeling Choice A: Notations of inoperativeness that appear within inoperative guidance documents

#### ***Labeling Choice A(1): Watermark across every page (DOD)***



#### ***Labeling Choice A(2): Prominent stamp at the top of inoperative guidance documents with information about when the document was rescinded (CFPB)***

**! This material is for reference only.**

As of April 1, 2021, the Bureau rescinded the statement entitled, "Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic" (Statement), regarding the Bureau's exercise of its supervisory and enforcement discretion during the pandemic. [See more information about the Bureau's rescission of the Statement.](#) The materials relating to the Statement on the Bureau's website are for reference only.

Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, D.C. 20552

March 26, 2020

**Statement on Bureau Supervisory and Enforcement Response to COVID-19  
Pandemic**

Labeling Choice B: Notations of inoperativeness that appear on the agency website, outside of the document itself

*Labeling Choice B(1): Publishing a notice of rescission on agency website (CFPB)*

The image shows a screenshot of two notices of rescission from the CFPB website. Each notice is dated 'PUBLISHED MAR 31, 2021' and includes a title, a brief description, and a 'SUPERVISION' tag. The first notice is titled 'Rescission of Statement of Policy on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic'. The second notice is titled 'Rescission of Statement of Policy on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic'. Both notices describe the rescission of policy statements issued between March 26 and June 3, 2020, providing temporary regulatory flexibilities in response to the COVID-19 pandemic.

*Labeling Choice B(2): Including the word "rescinded" within a table in which a link to the inoperative guidance document appears (DOD)*

<a href="#">Industrial Security Letter (ISL) 2011-01 (01/18/11) RESCINDED</a>	DOD-UIS-00117	Rescinded; National Industrial Security Operating Manual (NISPOM) paragraph 5-303 prohibits contractors from using non-GSA approved security containers for storage of classified material after October 1, 2012.	Industrial Security Letter (ISL), National Industrial Security Operating Manual (NISPOM), Contractors, Security Containers, Classified Material, Defense Security Service (DSS), Inspections, Requirement, Non-GSA, Storage Methods, Disposing, Classified Information, Rescinded	18-JAN-2011
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### ***Labels and Explanations of Inoperativeness Outside of Agency Websites***

In addition to labeling inoperative guidance documents that appear on agency websites, agencies have other options for communicating the status of inoperative documents.

As noted in Row F of Table 2 above, agencies published rescission notices for about 80% of the priority inoperative guidance documents I identified. Although some rescissions are legally required to be published in the *Federal Register* (as described above in Section III), agencies may also choose to use *Federal Register* publication in cases in which it is not legally required.

Agencies indicated that they publish rescissions in the *Federal Register* when they are especially eager to inform regulated entities that a guidance document has been rescinded. Agencies informed me that they believe regulated entities see the *Federal Register* as a more authoritative statement of the agency’s intent to rescind than mere publication on an agency website. Agencies noted that when they received a high volume of feedback or questions from regulated entities about a guidance document, they are more likely to publish its rescission in the *Federal Register*.

In addition to the *Federal Register*, five of the six agencies in the sample of interviewees indicated that they use means such as listservs and virtual meetings to announce to members of the public when they have revoked or changed guidance documents.

One agency official informed me that when the agency changes or rescinds a guidance document that it believes has had an impact on a large number of people, it holds a webinar to alert trade associations and public interest organizations that the guidance is now inoperative. It posts a notice of this webinar on its website several weeks in advance to give the public the opportunity to plan to attend and to prepare questions in advance.

Another agency official informed me that it is in the process of developing a subscription service. Once unveiled, members of the public will be able to subscribe to developments of interest and the agency will send those subscribers alerts, including alerts that a guidance document has been rescinded or modified.

Another agency official informed me that when the agency rescinds guidance documents, the agency’s press office issues a press release informing the public of the rescission. The agency then affirmatively notifies affected members of the public of the rescission by speaking before various groups that frequently interact with the agency (e.g., trade groups and public interest organizations).

## V. ISSUES IDENTIFIED FOR FURTHER RESEARCH

There are three issues that emerged during the research conducted for this report but for which time did not allow the opportunity to address in depth. Nevertheless, these three issues are raised here for the benefit of the committee's deliberations and other readers of the report. The three issues are: (1) partially inoperative guidance documents; (2) the amount of time that agencies should keep inoperative guidance documents online; and (3) retroactive applications of the report's findings.

### *Partially Inoperative Guidance Documents*

Although partially inoperative guidance documents are mentioned in passing in various parts of the report, there are special challenges associated with these documents that deserve careful, dedicated attention. For example, if an agency has formally rescinded only part of a document, might it be appropriate for the agency to rescind the entire old document but reissue as a new guidance document just the parts not rescinded? Or should the agency strike through the portions that have been rescinded and post only the struck-through version online? These are real questions for agencies to contemplate. Furthermore, how exactly should agencies deal with guidance documents that become partially inoperative because only part has been superseded or only part has gone into disuse?

### *The Amount of Time That Agencies Should Keep Inoperative Guidance Documents Online*

How long should agencies keep inoperative guidance documents online? Forever? If so, could that itself create a potential problem of confusion for the public? To some extent, the agency the report mentions as having a section for "archived guidance documents" and "guidance documents issued before 1999" might be moving in a positive direction, although the agency would still need to be clear about whether these documents are inoperative. It might be appropriate for agencies to adopt policies that they keep and properly label inoperative guidance documents in their usual index or database of guidance documents for only a few years, but then create online archives for purely historical purposes (albeit ones that are more clearly labeled than the agency referenced above).

### *Retroactive Applications*

The final theme unaddressed by the report is retroactivity. That is, should agencies seek to find those inoperative guidance documents already on their websites that are not appropriately organized or labeled and apply the recommendations below to such documents? Should agencies seek to find those inoperative guidance documents currently in their internal files, outside of public view, and decide whether to post them online? Or should agencies just be thinking prospectively: that is, applying the below recommendations to guidance documents that become inoperative in the future, without worrying about those that are already inoperative?

## VI. RECOMMENDATIONS

The recommendations below do not necessarily reflect anyone's views aside from my own; they are intended only to catalyze discussion.

Agencies should consider all the provisions in Administrative Conference Recommendation 2019-3 when considering how to manage their inoperative guidance documents. The below provisions, distilled from Recommendation 2019-3 and modified in certain respects, speak most directly to inoperative guidance documents.

### **Deciding Which Types of Inoperative Guidance Documents to Make Publicly Available on Agency Websites**

1. Agencies should affirmatively determine which types of guidance documents that have been rescinded, superseded, or have fallen into disuse (hereafter "inoperative guidance documents") should be made publicly available on their websites.
2. In making the determination referred to in Paragraph 1, agencies should first consider whether the guidance document had been previously posted online when it was operative, and then consider additional factors such as the following:
  - a. Whether the inoperative guidance document appears to be of interest to the public, as indicated by many unique page views or downloads of the document (either while the document was operative or while it was inoperative but already made available), or by many unique inquiries about the document;
  - b. Whether the inoperative guidance document, while operative, generated reliance interests, as indicated by frequent citations of the operative version of the document in regulations, briefs, or news sources, or substantial public feedback on the operative version of the document; or
  - c. Whether the inoperative guidance document dealt with an issue of national significance or a controversial matter, as indicated by submission to the Office of Information and Regulatory Affairs (OIRA) of the operative version of the guidance document or publication in the agency's *Unified Agenda* of the same.

### **Establishing Written Procedures for Priority Inoperative Guidance Documents**

3. Agencies should develop and publish, on their websites, written procedures governing the storage and display of those inoperative guidance documents the agencies have affirmatively determined should be made publicly available on their websites (hereafter "priority inoperative guidance documents"). These procedures can either be part of their procedures governing storage and display of guidance documents writ-large or can be stand-alone procedures. At a minimum, these procedures should:
  - a. Provide for how priority inoperative guidance documents are to be compiled and organized on agency websites to make it easy for people to find the priority inoperative guidance documents in which they are interested; and
  - b. Specify the labels and explanations the agency will use to ensure the public can readily understand the significance and effect of priority inoperative guidance documents.

## **Organizing and Labeling Priority Inoperative Guidance Documents on Agency Websites**

4. Agencies should organize priority inoperative guidance documents on their websites to make it easy for people to find the priority inoperative guidance document in which they are interested. Among the options to consider, alone or in tandem with one another, are:
  - a. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively to housing priority inoperative guidance documents, with links to such documents;
  - b. Providing a search function that uncovers priority inoperative guidance documents; and
  - c. Using a method, such as a pull-down menu, that allows the user to view a priority inoperative guidance document at different points in time, with an indication on each version of the document that the document is inoperative.
5. Agencies should label priority inoperative guidance documents on their websites to ensure the public can readily understand the significance and effect of those guidance documents. Among the labeling methods to consider, alone or in tandem with one another, are:
  - a. Including a watermark that reads “rescinded,” or uses similar terminology, across each page of the document;
  - b. Including a prominent stamp at the top of the document that notes it is rescinded and indicates the date of rescission;
  - c. Publishing a notice of rescission on the agency website and providing a link from the document to the notice; and
  - d. Including the word “rescinded” (or similar terminology) within a table in which a link to the inoperative guidance document appears.

## **Using Means Other Than Agency Websites to Notify the Public of the Availability of Priority Inoperative Guidance Documents**

6. Agencies should consider using the following methods, among others, to alert interested members of the public to the availability of priority inoperative guidance documents, alone or in conjunction with one another
  - a. Publishing notices of rescission of priority inoperative guidance documents in the *Federal Register*, even when not required to do so by law;
  - b. Sending announcements of the availability of priority inoperative guidance documents over listservs that consist of interested members of the public;
  - c. Announcing the availability of priority inoperative guidance documents through virtual or in-person meetings;
  - d. Announcing the availability of priority inoperative guidance documents through webinars;
  - e. Using or developing a subscription service to allow members of the public to subscribe to developments of interest, including the availability of priority inoperative guidance documents; and
  - f. Issuing press releases to announce the availability of a priority inoperative guidance document.

## VII. CONCLUSION

Overall, the research conducted for this report suggests that the current state of public availability of inoperative guidance documents is promising but has ample room for improvement. On the one hand, agencies appear to be comprehensively posting priority inoperative guidance documents on their websites and organizing them logically. They also generally appear to publish notices of rescission of priority inoperative guidance documents in the *Federal Register* and have developed or are developing innovative tools, such as subscription services and webinars, to alert members of the public as to the inoperativeness of priority inoperative guidance documents.

On the other hand, there is a minority but still substantial proportion of publicly posted inoperative guidance documents not labeled as such on agencies' websites. Confusing labeling practices such as the use of ambiguous language and the failure to link rescinded guidance documents to notices of rescission can hinder public understanding of the significance and effect of publicly posted inoperative guidance documents. And even on the points mentioned in the paragraph above (i.e., with respect to posting and organizing inoperative guidance documents), there is still some room for improvement, even if most agencies are doing a good job. Agencies should continue to take deliberate and systematic management steps to improve public access to and understanding of inoperative guidance documents.

## VIII. APPENDICES

### Appendix A: Excerpts of Key Statutory Provisions Referenced in Section III

#### *5 U.S.C. Section 552(a)(1) (FOIA)*

“Each agency shall make available to the public information as follows:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency; and . . . each amendment, revision, or repeal of the foregoing.”

#### *5 U.S.C. Section 552 (a)(2) (FOIA)*

“Each agency, in accordance with published rules, shall make available for public inspection in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . . .”

*44 U.S.C. Section 3102 (The Federal Records Act)*

“The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for . . . procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format . . . .”

*44 U.S.C. Section 3501 note (E-Government Act of 2002)*

“Not later than 2 years after the effective date of this title, the Director (of OMB) shall promulgate guidance for agency websites that includes . . . information made available to the public under subsections (a)(1) and (b) of section 552 of title 5 . . . (commonly referred to as the ‘Freedom of Information Act’).”

Appendix B: List of Specific Inoperative Guidance Documents Referenced in Table 2

CFPB

Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic (issued 3/26/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Quarterly Reporting Under the Home Mortgage Disclosure Act (issued 3/26/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Bureau Information Collections for Credit Card and Prepaid Account Issuers (issued 3/26/2021; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the Cares Act (issued 4/1/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Certain Filing Requirements Under the Interstate Land Sales Full Disclosure Act and Regulation J (issued 4/27/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic (issued 5/13/2020; rescinded 4/1/2021)

Statement on Supervisory and Enforcement Practices Regarding Electronic Credit Card Disclosures in Light of the COVID-19 Pandemic (issued 6/3/2020; rescinded 4/1/2021)

BCFP Bulletin 2018-01 (issued 9/25/2018; rescinded 4/1/2021)

## USPTO

General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office (revised 9/22/2021)

## FDA

Questions and Answers on Biosimilar Development and the BPCI Act (issued 12/12/2018; revised 9/20/2021)

Third edition of the final guidance on Submission of Plans for Cigarette Packages and Cigarette Advertisements (issued 2/2021; revised 7/12/2021)

Second edition of the final guidance on Submission of Plans for Cigarette Advertisements; Guidance for Industry (issued 5/2020; revised 2/16/2021)

## DOL

Secretary's Order 10-2020, Statement of Policy Regarding Independence of Advisory Committee Members (issued 11/6/2020; rescinded 7/26/2021)

## EPA

Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program (issued 1/21/2021; rescinded 9/16/2021)

## DOD

Deputy Secretary of Defense Memorandum, Updated Mask Guidelines for Vaccinated Persons (issued 5/13/2021; rescinded 7/28/2021)

## FTC

Statement of Enforcement Principles Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (issued 8/13/2021; rescinded 7/1/2021)

Vertical Merger Guidelines (issued 6/30/2020; rescinded 9/15/2021)

## DOT

Memorandum for Secretarial Officers and Heads of Operating Administrations from Steven G. Bradbury, Subject: Review and Clearance of Guidance Documents (issued 12/20/2018; rescinded on or around 3/2021)

NHTSA

Untitled letter to Chris Urmson, Director, Self-Driving Car Project from Paul A. Hemmersbaugh, Chief Counsel, NHTSA (issued 2/4/2016; rescinded 12/21/2020)